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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1969

No. 927

JOHNNY WILLIAMS, *Petitioner,*

vs.

STATE OF FLORIDA, *Respondent.*

On Writ of Certiorari to the Florida District Court of Appeal, Third District

BRIEF AMICUS CURIAE ON BEHALF OF VIRGIL JENKINS

STATEMENT AS TO INTEREST OF AMICUS CURIAE

Virgil Jenkins, on whose behalf this brief *amicus curiae* is filed, is currently serving a 50 year sentence in the state penitentiary at Lansing, Kansas, having been convicted of the crime of robbery. There has been prepared and will shortly be filed in the District Court of Sedgewick County, Kansas a Motion to Vacate

Sentence[1] on behalf of Mr. Jenkins asserting, *inter alia*, that his conviction was obtained in violation of the Fifth and Fourteenth Amendments to the United States Constitution because of the invocation at his trial of the Kansas "alibi" statute, Section 62-1341 of the Annotated Statutes of Kansas. He has filed this *amicus curiae* brief because there is a substantial probability that any decision as to the constitutionality of Rule 1.200 of the Florida Rules of Criminal Procedure which might be rendered in this case would also be controlling in his own case; moreover, as will appear, the facts of *amicus'* case demonstrate more clearly—and, perhaps, more compellingly—than the case now before the Court the arbitrary and unconstitutional fashion in which alibi-notice procedures operate to infringe rights specifically protected by the Constitution of the United States.

Amicus was charged with participation in the robbery of a Wichita motel in the early hours of the morning on July 26, 1967. He was arrested later in the morning along with two other men; items found on their persons and in the car in which they were riding strongly suggested that all or some of them were participants in the robbery.

After the conclusion of the prosecution's case-in-chief, the defense at first indicated that it was not its intention to call any witnesses. Thereafter, counsel for

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[1]Under Kansas procedure, a Motion to Vacate Sentence, which is filed pursuant to KANSAS GEN. STATS. ANN. § 60-1507, serves in lieu of a petition for habeas corpus as the manner by which a criminal conviction is collaterally attacked much as motions to vacate under 28 U.S.C. § 2255 serve in the federal courts.

the defense moved to reopen the case and called defendant Virgil Jenkins to the stand. He proceeded to testify that he was in a poolhall between the hours of midnight and approximately 3:00 A.M. on the night of the robbery, and thereafter was picked up by one of the two other men found in the car at the time of his arrest. The import of this testimony, of course, was that he could not have participated in the robbery because, at the time of its commission, he was somewhere else.

At this point, the prosecutor objected and moved that the defendant's entire testimony be striken on the ground that it constituted an alibi, and that no notice thereof had been given as required.[2] This ob-

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[2]KANSAS GEN. STATS. ANN. § 62-1341 (1964) provides as follows:

In the trial of any criminal action in the District Court, where the complaint, indictment or information charges specifically the time and place of the offense alleged to have been committed, and the nature of the offense is such as necessitated the personal presence of the one who committed the offense, and the defendant proposes to offer evidence to the effect that he was at some other place at the time of the offense charged, he shall give notice in writing of that fact to the county attorney. The notice shall state where defendant contends he was at the time of the offense, and shall have endorsed thereon the names of witnesses which he proposes to use in support of such contention.

On due application, and for good cause shown, the court may permit defendant to endorse additional names of witnesses on such notice, using the discretion with respect thereto now applicable to allowing the county attorney to endorse names of additional witnesses on an information. The notice shall be served on the county attorney as much as seven days before the action is called for trial, and a copy thereof, with proof of such service, filed with the clerk of the court: *Provided,* On due application and for good cause shown the court may permit the notice to be served at any time before the jury is sworn to try the action.

In the event the time and place of the offense are not specifically stated in the complaint, indictment or information, on application of defendant that the time and place be definitely

jection was sustained, and Mr. Jenkins' entire testimony was struck. On appeal, the Kansas Supreme Court upheld this ruling (*State v. Jenkins*, 203 Kan. 354, 454 P.2d 496 (1969), incorporating by reference the ruling in a companion case, *State v. Kelly*, 203 Kan. 360, 454 P.2d 501 (1969)).[3]

In the present case, Petitioner Williams had sought from the Florida courts a pre-trial order protecting him from disclosure of the names of his alibi witnesses which under Florida law were required to be

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stated in order to enable him to offer evidence in support of a contention that he was not present, and upon due notice thereof, the Court shall direct the county attorney either to amend the complaint or information by stating the time and place of the offense as accurately as possible, or to file a bill of particulars to the indictment or information so stating the time and place of the offense, and thereafter defendant shall give the notice above provided if he proposes to offer evidence to the effect that he was at some other place at the time of the offense charged.

Unless the defendant gives the notice as above provided he shall not be permitted to offer evidence to the effect that he was at some other place at the time of the offense charged. In the event the time or place of the offense has not been specifically stated in the complaint, indictment or information, and the Court directs it be amended, or a bill of particulars filed, as above provided, and the county attorney advises the Court that he cannot safely do so on the facts as he has been informed concerning them; or if in the progress of the trial the evidence discloses a time or place of the offense other than alleged, but within the period of the statute of limitations applicable to the offense and within the territorial jurisdiction of the Court, the action shall not abate or be discontinued for either of those reasons, but defendant may, without having given the notice above mentioned, offer evidence tending to show he was at some other place at the time of the offense.

[3]No petition for certiorari was filed from that ruling, Mr. Jenkins' counsel being of the opinion that there might be some possible question as to whether the federal question was fully raised with respect to the alibi issue in the Kansas courts. For that reason, it was decided that a Motion to Vacate Sentence should first be brought in the trial court and, if relief should be denied by the state courts, to then seek certiorari in this Court. It was to that end that the pending Motion to Vacate was filed.

disclosed to the prosecution. Unsuccessful in that effort, he complied with the requirement, presumably on pain of the extreme sanction—exclusion of the defendant's evidence of an alibi—which attends to those who fail to give the specified notice. In *amicus'* case, however, notice was never given, and as a consequence he was not allowed to prove that he was somewhere other than at the scene of the alleged offense at the time of its commission. Indeed, Mr. Jenkins was not allowed to *personally give testimony at his own trial.* (This portion of the trial transcript is reproduced in Exhibit "A" herein.)

The case of *amicus,* then, presents a factual variation from the case now before the Court; it is one, we believe, which reveals the operation of the alibi-notice rule, as it exists in states such as Florida and Kansas, in its most vicious dress. Two entirely distinct constitutional questions are, we submit, presented by such a provision: *First,* whether the State may constitutionally compel the defendant in a criminal case to give the prosecution notice as to the nature of the defense it intends to offer, together with the names and addresses of the witnesses it intends to call in support of that defense; and *second,* even if that requirement is constitutional, whether it may be enforced by excluding the evidence respecting that defense—including the defendant's own testimony—as the penalty for failure to comply with the notice requirement. These are substantial questions, and they are clearly presented by the case of Virgil Jenkins. He was not allowed to offer critical evidence—his own testimony—which, if believed by the jury, would have

compelled his acquittal. This *amicus curiae* brief examines the constitutional questions described above which such a practice raises in the hope that it will further illuminate the issues now before the Court.

SUMMARY OF ARGUMENT

1. It is the constitutional right of the defendant, secured by the privilege against self-incrimination, to refrain from assisting the prosecution in any way in securing his own conviction. This absolute right of silence reflects our Anglo-American notion of due process in criminal proceedings, in which the burden of proof is imposed upon the prosecution, with the defendant privileged to stand moot and put the prosecution to its proof. Only after the defendant has heard the prosecution's case against him need he decide whether to waive that privilege and to offer evidence of innocence. There are substantial reasons why an innocent defendant might prefer not to do so, and it is only *after* the prosecution has rested its case that he will be able intelligently to decide whether to waive his right of silence. The requirement that the defendant give advance notice of an alibi defense violates this Due Process structure, and offends the constitutional protections afforded the accused by the Fifth and Fourteenth Amendments by compelling a decision in advance of trial as to whether an alibi defense will be offered.

2. Even if the prosecution may compel the defense to give advance notice of an alibi defense, it may not

foreclose him from offering evidence of his innocence as the penalty for mere non-compliance with that requirement. The prosecution's legitimate interests may be adequately protected by other, less onerous, means (such as a continuance of the trial); to deny wholly the defendant the right to prove his innocence is a blatant denial of Due Process of Law.

ARGUMENT

INTRODUCTION

This case presents for decision the constitutionality of a practice by which a defendant in a criminal case forfeits his right to offer evidence of his innocence (and, in some states including Kansas, even to testify on his own behalf) if he has for any reason failed to give notice of his intention to present an "alibi" defense at his trial.[4] In many states, this compulsory prior notice must be accompanied by a list of the names and addresses of the witnesses the defense intends to call in support of the alibi defense.

This procedure, which compels the accused to assist the prosecution in sealing his conviction, is at the least a curious departure from our accusatorial tradition.[5] Moreover, it punishes even non-willful failures

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[4]At least one state, while requiring advance notice of an intention to present an alibi defense, protects the interests of the prosecution by allowing for a continuance when the defense, without having given notice, seeks to present evidence of an alibi but does not prevent the defendant from making the defense. See note 22, infra.

[5]While a majority of American jurisdictions manage to do without the alibi-notice procedure, the practice is sufficiently widespread to justify this Court's review. In addition to Florida, we are aware of fifteen states having alibi-notice requirements.

to comply with the notice requirement with total suppression of what may be a controlling aspect of the defense. Surprisingly, its constitutionality has, until this case, seldom been questioned. Those few reported decisions considering challenges to the alibi statutes have, moreover, confined their analysis to only one of what we conceive to be two entirely separate aspects of their constitutional infirmity; thus there has been consideration—and rejection—of the contention that the privilege against self-incrimination is violated by the requirement that the accused give prior notice of his intention to offer an alibi defense, but virtually no consideration of whether that requirement, even if constitutional, may be enforced by the sweeping denial of the defendant's right to present evidence in his defense.[6]

Eight require, in addition to the notice of an intention to assert an alibi defense, a list of witnesses the defendant intends to call. ARIZ. R. CRIM. P. 192(B)(1959); IND. ANN. STAT. §§ 1631-33 (1956); KAN. GEN. STAT. ANN. § 62-1341 (1964); MICH. COMP. LAWS § 768.20-.21 (Supp. 1956); N.J. RULES 3:5-9 (1958); N.Y. CODE CRIM. P. § 295-1 (1958); PA. R. CRIM. PRO. 312, 19 P.S.App.; WIS. STAT. § 955.07 (1961). Seven others require only the notice as to the intended defense. IOWA CODE § 777.18 (1962); MINN. STAT. § 630.14 (1961); OHIO REV. CODE ANN. § 2945.58 (Page 1964); OKLA. STAT. tit. 22 § 585 (1961); S.D. CODE § 34.2801 (Supp. 1960); UTAH CODE ANN. § 77-21-17 (1964); VT. STAT. ANN. tit. 13, §§ 6561-62 (1959).

[6]The principal decisions of which we are aware are *Rider v. Crouse*, 357 F.2d 317 (10th Cir. 1966); *State v. Stump*, ... Iowa ....., 119 N.W.2d 210 (1963); *State v. Smetna*, 131 Ohio St. 329, 2 N.E.2d 778 (1936); *State v. Thayer*, 124 Ohio St. 1, 176 N.E. 656 (1931) (with three judges expressing the view that the alibi statute is unconstitutional); *People v. Shulenberg*, 279 App. Div. 1115, 112 N.Y.S.2d 374, 375 (1952); *People v. Rakiec*, 260 App. Div. 452, 23 N.Y.S.2d 607, 612-13 (1940) (holding, however, that the statute does not apply to the testimony of the defendant but only to other witnesses); *People v. Schade*, 161 Misc. 212, 292 N.Y.S. 612, 615-19 (1936); *Commonwealth v. Vecchiolli*, 208 Pa. Super. 483, 224 A.2d 96 (1966); *State v. Kopacka*, 261 Wis. 70, 51 N.E.2d 495, 497-98 (1952).

We think it particularly fitting that at this time the Court undertake a review of the entire question. There appears to have been no really serious canvassing of the constitutionality of these alibi statutes since this Court made applicable to state criminal proceedings the protections of the Fifth Amendment privilege against self-incrimination.[7] Moreover, recent developments of constitutional doctrine put into clearer perspective the basis of the constitutional claim which, as noted, has never been adequately canvassed by the lower courts—whether the defendant may be wholly disabled from presenting evidence (sometimes, as in the case of *amicus*, including his own testimony)[8] establishing a vital defense, simply because of his failure to comply with a procedural requirement that he give prior notice of that defense.

Perhaps it is well to preface our analysis with the observation that we do not urge the Court to test this Florida procedure by a subjective standard of fairness. To be perfectly candid, *Spencer v. Texas*, 385 U.S. 554 (1967) makes it abundantly clear that an argument premised upon subjective notions of fairness bears a heavy burden. We disclaim any intention to appeal merely to what some may think "to be fairer or wiser or to give a surer promise of protection to the prisoner at bar." *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934). Nor even do we rely on "the traditional jurisprudential attitudes of our legal sys-

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[7] *Malloy v. Hogan*, 378 U.S. 1 (1964); *Murphy v. Waterfront Commission*, 378 U.S. 52 (1964).

[8] In some jurisdictions, including Florida, the defendant's own testimony would not be excluded for failure to give the required notice but only that of other witnesses. See note 17, infra.

tem" which the dissenters in *Spencer* thought invalidated the Texas recidivist procedure upheld in that case. 385 U.S. at 570. In our view, the case against Florida's alibi statute and its counterparts in other jurisdictions is premised on specific and well-established constitutional guarantees. Thus this case need not be an occasion for reopening the always fascinating debate between those who believe that this Court's jurisdiction over state criminal procedures is limited "to specific Bill of Rights' protections" *(Duncan v. Louisiana,* 391 U.S. 145, 171 (Black, J., concurring)) and those who conceive a limited jurisdiction under the Due Process Clause for the protection of substantive "personal rights that are fundamental" *(Griswold v. Connecticut,* 381 U.S. 479, 486 (1965) (concurring opinion)) or to deal with assertedly unfair criminal procedures "fundamentally at odds with traditional notions of due process . . . [which] needlessly [prejudice] the accused without advancing any legitimate interest of the State." *Spencer v. Texas,* supra, at 570 (dissenting opinion). Whatever one's conception of the reach of the Due Process Clause in such matters, alibi statutes such as Florida's cannot stand, for they violate specific, established constitutional guarantees. We turn to an analysis of that infringment.

I

THE DEFENDANT CANNOT, CONSISTENTLY WITH THE FIFTH AND FOURTEENTH AMENDMENTS, CONSTITUTIONALLY BE COMPELLED TO DISCLOSE TO THE PROSECUTION, IN ADVANCE OF TRIAL, INFORMATION RESPECTING THE NATURE OF THE DEFENSE HE WILL OR MAY ASSERT

This Court has had frequent occasion to recall that ours is an accusatorial system and that, unlike the systems of some other countries, the defendant in a criminal case need do nothing whatever which might in any way lead to his conviction. The prosecution must "shoulder the entire load" (8 WIGMORE, EVIDENCE 317 (McNaughton rev. 1961), quoted in *Miranda v. Arizona*, 384 U.S. 436, 460 (1966)); the defendant may not be made, in Hawkins' oft-quoted phrase, "the deluded instrument of his own conviction". 2 Hawkins, PLEAS OF THE CROWN 595 (8th ed. 1824). Its origins may be complex and imperfectly understood; but the Fifth Amendment, now fully applicable to state proceedings,[9] clearly reflects not only *values* fundamental to our system of criminal law but also the very *structure* of that system. The prosecution bears the burden of independent investigation, of going forward, and of proving the defendant's guilt beyond a reasonable doubt (*Morrison v. California*, 291 U.S. 82 (1934); *Leland v. Oregon*, 343 U.S. 790, 805-6 (1952) (Frankfurter, J., joined by Black, J., dissenting); *cf. Speiser v. Randall*, 357 U.S. 513, 526 (1958) ("Due process

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[9]See authorities cited note 7 supra; see also *Gardner v. Broderick*, 392 U.S. 273 (1968); *Spevack v. Klein*, 385 U.S. 511 (1967); *Garrity v. New Jersey*, 385 U.S. 493 (1967); *Stevens v. Marks*, 383 U.S. 234 (1966); *Griffin v. California*, 380 U.S. 609 (1965); *Anderson v. Nelson*, 390 U.S. 523 (1968) (per curiam).

commands that no man shall lose his liberty unless the Government has borne the burden of producing the evidence and convincing the fact-finder of his guilt.")), unassisted by any irrational presumptions (see *Tot v. United States*, 319 U.S. 463 (1943); *United States v. Romano*, 382 U.S. 136 (1965); *Leary v. United States*, 395 U.S. 6 (1969); compare *United States v. Gainey*, 380 U.S. 63 (1965). The defendant bears no duty to prove his innocence. *Cf. Garner v. Louisiana*, 368 U.S. 157 (1951); *Thompson v. City of Louisville*, 362 U.S. 199 (1960). The defendant may not be compelled to testify; indeed, he may not even be called by the prosecution to the witness stand and asked whether he wishes to testify.[10]

This structure, and the allocation of burdens which it reflects, is fundamental to our jurisprudence. Here basic principles of Due Process (see *Watts v. Indiana*, 338 U.S. 49, 54-55 (1949) (plurality opinion); *Culombe v. Connecticut*, 367 U.S. 568, 581-83 (1961) (plurality opinion); *Rogers v. Richmond*, 365 U.S. 534, 540-41 (1961) have become "assimilated" (*Culombe v. Connecticut*, supra, at 583, n. 25) with the Fifth Amendment privilege against self-incrimination. See *Malloy v. Hogan*, 378 U.S. 1 (1964). Consistently these cases reflect

> "recognition that the American system of criminal prosecution is accusatorial, not inquisitorial, and that the Fifth Amendment privilege is its

[10] VIII WIGMORE, EVIDENCE § 2268, pp. 406-08 and n. 6 (McNaughton rev. 1961); *Cephus v. United States*, 324 F.2d 893 (D.C.Cir. 1963); *United States v. Housing Foundation of America*, 176 F.2d 665 (3d Cir. 1949); *People v. Talle*, 111 Cal.App.2d 650 (1952).

> essential mainstay. . . . Governments, state and federal, are thus constitutionally compelled to establish guilt by evidence independently and freely secured, and may not by coercion prove a charge against an accused out of his own mouth." (*Malloy v. Hogan,* supra, at 7-8).

The requirement that a defendant give notice to the prosecution of his intention to assert an alibi defense flies in the teeth of these principles. It compels him to become an unwilling aide to the prosecution, providing it with information which may assist in his conviction. The prosecution, at the point in the proceedings when the defendant is required to give notice of an alibi defense, has progressed far beyond merely having "focused" on the accused (*cf. Escobedo v. Illinois,* 378 U.S. 478, 491 (1964)); the defendant is the target of a determined, adversary deployment of the state's substantial resources in an effort to convict and imprison him. That complex of values safeguarded by the Fifth Amendment is infringed when he can be required to offer the slightest assistance to his adversary.

Moreover, disclosure of a potential alibi defense prior to trial forces the defendant to decide what he has not previously been required to decide until *after* the prosecution has been put to its proof: whether he will stand mute, exercising his constitutional right of silence, or whether he will present evidence—and, possibly, personally testify—by way of defense.

The principal argument for pretrial notice rests on the assertion that the defendant is in no way forced

to waive his constitutional right to remain silent in the face of charges against him, but is only required to accelerate the timing of that decision. But in our view of the adversary process enshrined in the Fifth and Fourteenth Amendments, it is precisely the defendant's *right* to defer that decision until after he has heard the State's case against him.[11] While he may ultimately elect to offer evidence and testify, the prosecution cannot compel him to do so, or accelerate the timing of his decision as, for example, by calling him to the witness stand. See authorities cited in note 10, supra. To advance the time at which the defendant must decide whether to raise an alibi defense violates this principle.

The violation of constitutional principles is anything but theoretical; it can work a considerable unfairness. The defendant may wish to avoid reliance on the alibi defense, if possible;[12] but often it will

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[11]That right, as we view it, is a component of the Fifth Amendment privilege against self-incrimination, though obviously it might equally be viewed as a basic principle of procedural due process. Note, 76 HARV. L. REV. 838, 840 (1963). As Mr. Justice Frankfurter noted in *Culombe v. Connecticut*, supra, Due Process principles and the privilege have, in this area, become "assimilated." See pp. 12-13, supra.

[12]In this respect, the present case differs from the question which is presented by general pretrial discovery against the defendant in a criminal case which is allowed as the price for granting the defendant discovery against the prosecution. *See, e.g.*, FED. R.CRIM.PRO. 16(c). While the constitutionality of that practice is by no means beyond dispute (*see, e.g.*, Statement of Mr. Justice Douglas, dissenting from the transmittal of the 1966 amendments to the Federal Rules of Criminal Procedure, 39 F.R.D. 272 (1966), it can arguably be defended on the ground that the defendant, by obtaining discovery against the prosecution, can at least determine in advance of trial the nature of the case against him and is thus in a position to make the kinds of decisions he

only *after* the prosecution has closed its case be in a position to judge whether he must run the risks which that defense entails.[13] But compliance with the alibi statute may well compel the defense to put in its alibi evidence even though, after consideration of the prosecution's case, it would prefer not to do so. This follows even though the statute itself does not in terms *require* the defense to introduce the alibi evidence which was the subject of its notice to the prosecution,

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otherwise could only make after hearing the prosecution's case-in-chief at trial.

It is somewhat ironic that one of the principal arguments frequently heard against allowing discovery against the prosecution in a criminal case—fear that the prosecution's witnesses will be harassed—has not caused comparable pause among the proponents of alibi-notice statutes. Yet there is ample reason for concern. Notice to the prosecution of an intention to rely on an alibi defense will predictably result in the questioning by the prosecutor (or by police officers acting under his direction) of the witnesses specified by the defendant as those he intends to call. Even restrained questioning by the prosecutor or his agents may frequently have a coercive impact upon the sorts of individuals of modest background who so frequently will be the basis of an alibi defense. It was precisely this concern that persuaded the California Bar Association to oppose an alibi-notice proposal (see note 19 infra) "on the ground that [this] would cause the harassment and intimidation of alibi witnesses by public officers." (36 CAL STATE B. J. 480, 487. (1961).

[13]The nature of those risks will, of course, vary from case to case. For example, (1) the witnesses on which the defendant would have to rely might be weak or particularly vulnerable to impeachment by proof of prior felony convictions; (2) establishment of the alibi might require testimony by the defendant himself, and thus a waiver of his privilege with the resulting subjection to impeachment through evidence of prior felony convictions; (3) the alibi might itself require the admission of another—uncharged—crime, or (in the case of a defendant on parole or probation) admission of conduct constituting violation of conditions of parole or probation; or (4) the alibi, though meritorious, may because of the nature of the evidence available to the defendant be potentially unbelievable; a cautious lawyer may be reluctant to present to the trier of fact evidence it is not likely to accept, with the resultant destruction of the credibility of the entire defense.

for it will often be the case that the prosecution, in presenting its opening statement or case-in-chief, will have anticipated the defense in some manner which will as a practical matter compel the defense to follow through with the alibi defense lest the jury draw an unfavorable inference from its failure to do so.

Even if the potential prejudice to the defendant were considerably less apparent, this alibi-notice procedure would be cause for grave concern. As the Court said in a similar context of the need for vigilance where Fifth Amendment interests are concerned, "illegitimate and unconstitutional practices get their first footing . . . by silent approaches and slight deviations from legal modes of procedure." *Boyd v. United States,* 116 U.S. 616, 635 (1886).

But for the reasons already mentioned, the prejudice is substantial. As a consequence of some of those considerations, a defendant considering reliance upon evidence establishing an alibi may feel compelled to forego that defense rather than give advance notice to the prosecution in compliance with the statute. Failure to do so in nearly all of the states having alibi rules will, however, prevent the defendant from changing his mind once the prosecution has rested; he is forever barred from introducing evidence—often including, as we have earlier noted, his own personal testimony—of an alibi. Similarly, fear of that terrible sanction may compel such a defendant to give notice of the alibi before he is in fact in a position to decide intelligently whether to make that decision. That obviously was the

case here. For that reason, we must now turn to an examination of the constitutionality of that sanction.

II

THE DEFENDANT MAY NOT CONSTITUTIONALLY BE DENIED THE OPPORTUNITY TO OFFER EVIDENCE, BY HIS OWN TESTIMONY ON OTHER WITNESSES, TENDING TO ESTABLISH HIS INNOCENCE, AS A PENALTY FOR NONCOMPLIANCE WITH A NOTICE REQUIREMENT

Even assuming what we do not concede, namely, that the State may constitutionally require a defendant to give the prosecution prior notice of his intention to offer an alibi defense along with the names and addresses of the witnesses he intends to call—this Florida procedure could not stand. For Florida, as do most (though not all)[14] of the States having alibi statutes, enforces that procedural requirement by denying defendants their right to present evidence of an alibi defense as to which they were required but failed to give notice. Our submission, stated simply, is that a defendant in a criminal case has no more fundamental constitutional right than the right to offer evidence—and testify, if he wishes—on the issues which the applicable law makes relevant in the case. This right the State may not abridge—indeed, wholly deny—for merely failing to comply with a procedural requirement whose benefits are, at the least, minimal and which in any event can be fully vindicated by means far less subversive of the defendant's Due Process rights.

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[14]See infra note 22 and accompanying text.

The right to be heard in defense against criminal charges is anything but an exotic constitutional creation at the penumbra of contemporary jurisprudence. To the contrary, it is so fundamental that few would dispute its constitutional stature; a literally unbroken stream of decisions of this Court (paralleled, of course, by decisions of courts throughout this country) have affirmed that, at a minimum, Due Process requires that a defendant in a criminal case "be present with counsel, have an opportunity to be heard, be confronted with witnesses against him, have the right to cross-examine, and to offer evidence of his own." *Specht v. Patterson,* 386 U.S. 605, 610 (1967); see also *In re Oliver,* 333 U.S. 257, 273-77 (1948) ("due process of law . . . requires that [the defendant] . . . have a reasonable opportunity to meet [the charges] by way of defense or explanation . . . and call witnesses in his behalf, either by way of defense or explanation"); *Oyler v. Boles,* 368 U.S. 448 (1962); *In re Gault,* 387 U.S. 1 (1967). The recent decisions of this Court specifically applying the various Sixth Amendment protections to State criminal proceedings add emphasis to the constitutional stature of the right to offer defensive evidence. They establish that the accused cannot be deprived of the opportunity to cross-examine the witnesses against him[15] and, more importantly for present purposes, neither may he be denied the right to compulsory process for obtaining witnesses whose testimony might be favorable. *Wash-*

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[15] *Pointer v. Texas,* 380 U.S. 400 (1965); *Douglas v. Alabama,* 380 U.S. 415 (1965); *Barber v. Page,* 390 U.S. 719 (1968).

ington v. Texas, 388 U.S. 14 (1967). Similarly, the defendant's right to effectively defend against the charges against him, and to offer evidence of his innocence, may not be indirectly infringed by an unreasonable denial of a continuance. *Ungar v. Sarafite,* 376 U.S. 575, 589 (1964).

One need only contrast these uncontradicted explications of a fundamental constitutional principle with the typical application of an alibi rule of the sort which Florida has adopted to perceive the grave constitutional difficulties presented by such a procedure. The case of *amicus* is instructive. Charged with participation in an armed robbery perpetrated by several individuals, he took the stand to testify that he was elsewhere—in a poolroom to be specific—at the time of the alleged offense. That testimony was of the gravest importance; if believed by the jury, it would have compelled his acquittal. His counsel, for reasons never disclosed on the record, had not given notice of the possible defense of alibi as Kansas law requires, and *amicus'* testimony was interrupted by an objection of the prosecutor, which was sustained. The defendant's testimony was thus abruptly terminated, and the jury instructed that it must disregard the defendant's protestations that he was elsewhere at the time the alleged offense occurred.[16] Thus in *amicus'* case, the denial of elementary due process was compounded by the trial court's order barring *the defendant himself* from testifying as to facts

[16] An excerpt from the trial transcript of *amicus* containing this portion of the trial is attached hereto as Appendix "A".

which would establish his innocence. *Cf. Ferguson v. Georgia,* 365 U.S. 570 (1961).[17]

We doubt that any justification exists for the outright denial of the right to offer evidence—indeed, to testify personally—at the trial on an issue which is not only relevant under the applicable law but is in fact potentially dispositive of the outcome of the case. But even if we were to accept that this most fundamental right might be weighed against some overriding, compelling state interest, no such countervailing considerations are present to justify the application of so sweeping a denial of constitutional rights for mere non-compliance with a technical requirement of notice.

The purpose which alibi statutes or rules such as the one before the Court are intended to serve—avoidance of surprise and perjurious testimony—is unobjectionable (although there is, for the reasons stated in Part I, supra, considerable doubt as to the State's constitutional power to achieve that goal by compelling the accused to give notice to it prior to trial). Most of these provisions stem from proposals made a number of years ago (see Epstein, *Advance Notice of Alibi,* 55 J. CRIM. L.C. & P.S. 29-31 (1964)), at a time when the federal Constitution had not been thought to impose much restraint upon state

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[17]Some states, including Florida, would not bar the defendant from testifying even though no notice was given, but would bar other witnesses. E.g., FLA.R. CRIM. PRO. 1.200; *State v. Stump,* ..... Iowa ....., 119 N.W. 2d 210 (1963); *State v. Thayer,* 124 Ohio St. 1, 176 N.E. 656 (1931); *People v. Rakiec,* 260 App. Div. 452, 23 N.Y.S. 2d 607 (1940). Kansas is not so generous.

criminal proceedings. The proponents of the alibi-notice procedure contended that the cause of justice would be well served by requiring the accused to give advance notice to the prosecution of its intention to raise an alibi defense; the prosecution might then have an adequate opportunity to investigate the facts of the defense and develop evidence of its own which might disprove it. *E.g., State v. Thayer,* supra; Millar, *The Modernization of Criminal Procedure,* J. CRIM. L. 344, 350 (1920). Some doubt has been expressed as to the necessity and efficacy of the notice requirement,[18] and barely more than a quarter of the States have adopted it;[19] further, as will be seen, not all of them routinely deny the accused his right to offer evidence of a critical defense as the penalty for noncompliance, but rather attempt to enforce that policy of disclosure by other means. See note 22, infra, and accompanying text.

With the merits of and the necessity for the alibi-notice procedure supported by somewhat less than overwhelming evidence, it is appropriate to consider

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[18]*See, e.g.,* Note, *Is Specific Notice of the Defense of Alibi Desirable?* 18 TEX.L.REV. 151 (1946).

[19]Proposals for an alibi-notice requirement have recently been made but not accepted in California (see Calif. Law Rev. Comm., RECOMMENDATION AND STUDY RELATING TO NOTICE OF ALIBI IN CRIMINAL ACTIONS (1960)) and in the federal criminal system (see Proposed Rule 12A, FED.R.CRIM.PRO., 1962 Draft, 31 F.R.D. 673 (1963)); that was the second occasion on which an alibi-notice requirement was rejected for the federal criminal system, as this Court in 1944 struck two alternate alibi provisions from the then proposed Federal Rules of Criminal Procedure. Epstein, *Advance Notice of Alibi,* 55 J. Crim. L.C. & P.S. 29, 30 (1964). See FED.R. CRIM.PRO. 12 (2d Preliminary Draft 1944).

whether these limited advantages might adequately be secured without depriving the defendant of his constitutional right to be heard and to offer evidence tending to establish his innocence. *E.g., United States v. Jackson,* 390 U.S. 570, 582-83 (1968); *United States v. Robel,* 389 U.S. 258, 268 (1967); *Dean Milk Co. v. City of Madison,* 340 U.S. 349, 354-56 (1951); see generally Wormuth and Mirkin, *The Doctrine of the Reasonable Alternative,* 9 UTAH L. REV. 254 (1964). Such an examination, we submit, convincingly demonstrates that the goal of preventing unjustifiable acquittals because of the prosecution's inability to disprove perjurious alibi defenses can adequately be protected by means far less destructive of cherished constitutional guarantees.[20] We consider some of them briefly:

(1) The trial court might punish the wilful disregard of an applicable rule of procedure by contempt —of either the accused, his counsel, or both. This assumes, of course, that the prosecution has a right to such notice, an assumption which is disputed in Part I, supra. But if the requirement of notice is constitutional, then neither the defendant nor his counsel should be immune from the imposition of

[20]Some of these alternatives would assist in encouraging the defense to give prior notice of an intended alibi defense; thus their constitutionality turns on whether the defendant can be *compelled* to give any such notice. See Part I, supra. As noted, there are grave constitutional doubts as to the constitutionality of that requirement, and some of the alternatives which we are about to consider *(e.g.,* continuing the trial) suggest that, if the Fifth Amendment question also turns on the availability of a less onerous alternative, such an alternative would not be difficult to find.

sanctions in the manner by which courts have traditionally protected their substantial interest in orderly procedure.

(2) The trial court might, where the prosecution has been surprised by the unannounced raising of an alibi defense, continue the trial for a reasonable period to allow the prosecution to make whatever investigation might be necessary to enable it to meet the defense.[21] In at least one state,[22] the trial court is empowered to continue the trial where an alibi defense is raised without prior notice, but does not have the power to exclude evidence of alibi. It is difficult to conceive of a situation in which the legitimate interests of the prosecution would not fully be pro-

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[21]The right of speedy trial, now a constitutional protection applicable to state criminal proceedings (*Klopfer v. North Carolina*, 386 U.S. 213 (1967); *Smith v. Hooey*, 393 U.S. 374 (1969)), would in no way be offended by a brief continuance for this purpose. The Sixth Amendment protects only against "undue and oppressive" delays (*United States v. Ewell*, 383 U.S. 116, 120 (1966)), and not against those which are justifiable and reasonable. *See, e.g., Harrison v. United States*, 392 U.S. 219 (1968). There could be no reasonable basis for complaint where the defendant's own failure to comply with the statute or rule requiring notice was the occasion for granting a continuance.

[22]See OKLA. STAT., Tit. 22, §585 (1961). Iowa has a similar statute, but there is judicial authority allowing exclusion of the alibi evidence. See *State v. Rourick*, 245 Iowa 319, 60 N.W.2d 529 (1953). Most states, but apparently not Kansas, at the least allow the trial judge discretion to allow the evidence and protect the interests of the prosecution by other means such as continuance. See Note, 15 STAN. L. REV. 700, 701 & n. 7 (1963). Moreover, there is some evidence that even in those states which by statute absolutely bar alibi evidence where notice should have been but was not given, trial judges ameliorate the harshness of that provision by ignoring it. See Note, *Is Specific Notice of the Defense of Alibi Desirable?*, 18 TEX. L. REV. 151, 156 (1940); see Epstein, *Advance Notice of Alibi*, supra, at 36.

tected by a continuance, the granting of which might even be made mandatory lest there be any doubt as to the willingness of trial judges to grant continuances in the circumstances.

(3) Should the defendant fail to give the required notice (and, again, assuming that the requirement is constitutional), that violation might be a proper basis for declaring a mistrial in circumstances (which, presumably, would be exceedingly rare) in which simply ordering a continuance would not be adequate to protect the legitimate interests of the prosecution.[23]

(4) The prosecutor might be allowed to argue to the jury where the facts warrant, that the surprise assertion of an alibi defense (in violation of the requirement that he give advance notice) prejudiced the State's ability to deal with that defense and, moreover, must be viewed critically in view of the circum-

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[23]While the ordering of a mistrial could in theory give rise to a claim that a retrial would constitute jeopardy in violation of the Fifth Amendment *(Benton v. Maryland,* 395 U.S. 784 (1969)), such a contention would seem ill founded. See *Gori v. United States,* 367 U.S. 364 (1961). Such a case would not involve any of the factors which might render a retrial following a mistrial as a violation of the double jeopardy clause, such as a mistrial ordered because of wrongful conduct on behalf of the prosecution or where the purpose of the trial judge was to "help the prosecution, at a trial in which its case is going badly, by affording it another, more favorable opportunity to convict the accused." *(Id.,* at 905). To the contrary, our hypothetical mistrial would be the response to the defendant's failure to comply with the requirement that he give advance notice of an alibi defense, in the rare case where no other remedy would suffice. Particularly when viewed as an alternative to the far harsher procedure presently practiced—exclusion of the defendant's alibi evidence altogether—such an order should not be deemed a denial of due process. In any event, it would be a highly unusual case in which the other alternatives discussed above would not fully protect the interests of the prosecution.

stances.[24] Similarly, an instruction to that effect from the trial judge might be in order.

The foregoing alternatives—which may well be considerably short of exhaustive—would, singly or in combination, provide full protection for the legitimate interests of the prosecution which are said to be the basis for the alibi-notice requirement. There is, plainly and simply, no possible justification for a sanction which wholly denies the opportunity to be heard on a vital aspect of his defense. The alibi-notice provisions of Florida and Kansas—and the other jurisdictions which similarly deny the defendant the right to be heard—are fundamentally arbitrary, viciously choking off the defense as a penalty for what is at most a procedural omission.

The unfairness of that approach is particularly apparent when viewed against the background of the realities of criminal law administration in this country. A substantial number of defendants in criminal cases are indigent or nearly so. They may be represented by court appointed counsel, a Public Defender, or one of the attorneys whose office is the local criminal court and whose practice is operated, as the recent Presidential Crime Commission's Task Force on the Administration of Justice phrased it, on "a mass production basis." TASK FORCE REPORT: THE COURTS 32 (1967). Frequently, counsel will have had little or no opportunity to study the case much in advance of trial;

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[24] Such a comment would not violate the rule of *Griffin v. California*, 380 U.S. 609 (1965) if, contrary to the argument of Part I, supra, the alibi-notice requirement is not held to violate the Fifth and Fourteenth Amendments.

it is not uncommon for client and counsel to meet just before the trial.[25] Inadvertance or the errors of counsel may account for a substantial proportion of the instances in which the required notice is not given and the alibi defense thereby lost forever; but it is the defendant, not his lawyer, who must pay the price. *Compare Fay v. Noia,* 372 U.S. 391, 439 (1963). Thus a penalty—the loss of the right to present an alibi defense—which would be unfair even as to a defendant who deliberately concealed his intention to present an alibi defense is also indiscriminately applied to the non-wilful defendant who, perhaps through the blunders of counsel or due to his late entry into the case, fails to give the required notice.[26]

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[25] *See, e.g.,* Oaks and Lehman, *The Criminal Process of Cook County* and *The Indigent Defendant,* 1966, UNIV. OF ILL. L. FORUM, 584, 693 (1966); THE CHALLENGE OF CRIME IN A FREE SOCIETY, 128-29 (1967):

> In many lower courts defense counsel do not regularly appear, and counsel is either not provided to a defendant who has no funds; or, if counsel is appointed, he is not compensated. The Commission has seen, in the "bullpens" where lower court defendants often await trial, defense attorneys demanding from a potential client the loose change in his pockets or the watch on his wrist as a condition of representing him. Attorneys of this kind operate on a mass production basis, relying on pleas of guilty to dispose of their caseload. They tend to be unprepared and to make little effort to protect their clients' interests.

[26] This case involves the baldest of infringements of the right of an accused to be heard and to present evidence. Recognition of the unconstitutionality of that infringement surely does not imply that a federal question would be presented by the even-handed application of traditional rules of evidence as to admissibility, any more than the application of the Sixth Amendment right of confrontation to state criminal proceedings (see authorities cited note 15, supra) has superseded state hearsay rules with a federal evidence code (*cf. United States v. Augenblick,* 393 U.S. 348, 355-56 (1969)), or the right to compulsory service of process supersedes "nonarbitrary state rules" regarding the capacity of a witness to testify. *Washington v. Texas,* 388 U.S. 14, 23 n.21; see also *id.,* at 24-25 (Harlan, J., concurring).

CONCLUSION

For the reasons stated in Part I of this brief, the prosecution is not entitled to the assistance of the defense in the preparation of its case for trial, and may not require him to give notice of and information about the intended defense. The defendant has a constitutional right to defer its decision as to reliance upon an alibi defense until *after* he has heard the prosecution's case against him.

Moreover, even if the defendant can constitutionally be compelled to give such notice, he may not be deprived of his constitutional right to be heard and to present relevant evidence tending to establish his innocence for mere non-compliance with the notice requirement; the prosecution's legitimate interests may adequately be protected by means far less subversive of the defendant's rights.

For these reasons, the conviction of the petitioner should be reversed.

Dated: January 20, 1970.

Respectfully submitted,

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Attorneys for Amicus Curiae,
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(Appendix "A" Follows)

Appendix "A"

EXCERPT FROM THE TRIAL TRANSCRIPT OF THE STATE OF KANSAS VS. THOMAS KELLY AND VIRGIL JENKINS, CASE NO. CR 4276-67, DISTRICT COURT OF SEDGWICK COUNTY, KANSAS, DIVISION SIX, OCTOBER 30, 1967, pp. 155-161:

The Court: The defendant, Mr. Jenkins, has indicated that he would like to testify in his own behalf.

The Court: All right, bring the jury in, Mr. Knott.

The Bailiff: Jury is all present and accounted for, Your Honor.

The Court: Very well, Mr. Knott. Do you wish to make an announcement, Mr. Hayes?

Mr. Hayes: Yes, Your Honor, the defense moves to reopen its case and would like to present evidence to the court and jury.

The Court: Very well. Do you have any objection, Mr. Focht?

Mr. Focht: No, Your Honor.

The Court: Very well, the case will be reopened.

Before proceeding, Mr. Hayes, I wish to advise the jury that the State of Kansas and the defendants have entered into the following stipulation: That on the night in question, July 26, July 25th, 1967, the 1965 Mustang in question was titled in the name of Burney Henderson Smith, that at the time the automobile was stopped on July 26, 1967, the driver of the automobile was Burney Henderson Smith.

Your witness, Mr. Hayes.

Mr. Hayes: The defense will call Mr. Jenkins.

The Court: Very well. Mr. Jenkins, will you come forward, sir?

VIRGIL JENKINS

called as a witness on his own behalf, after having first been duly sworn, testifies as follows:

Direct Examination

by Mr. Hayes:

Q. State your name and address for the court, please?

A. Virgil Jenkins.

Q. And where were you residing on the 25th of July, 1967?

A. 3212 Olive, Kansas City, Missouri.

Q. Now, did you on about the 26th of July, 1967, come to the City of Wichita?

A. Yes.

Q. And what mode of transportation did you come?

A. '65——

The Court: Excuse me, gentlemen. I would like to have counsel approach the Bench, please. Have you advised Mr. Jenkins that he doesn't have to testify?

Mr. Hayes: I'll do so in my examination. Of course, he knows; I have talked to him about it.

The Court: Well, let's do it in your examination.

Q. (By Mr. Hayes) You understand, sir, you don't have to testify in your own behalf?

A. Yes.

Q. You understand that. You could invoke the Fifth Amendment and thereby exempt yourself from any testimony in this case?

A. Yes, sir.

Q. Is it your desire to freely—is it your free and voluntary desire to testify in this case in your own behalf?

A. Yes.

Q. And do you understand that by doing so you waive the Federal immunity?

A. Yes.

Q. And subject yourself to——

A. Yes.

Q. ——questions?

The Court: You understand also, Mr. Jenkins, that anything you say will be, can and will be used against you?

A. Yes.

The Court: All right.

Q. (By Mr. Hayes) Do you also understand, Mr. Jenkins, that anything you say may be held against you or for you? I appreciate that.

A. Yes.

Q. All right. What mode of operation was used to come to the City of Wichita?

A. 1965 Mustang.

Q. Now, would you tell the court in your own words what happened after you arrived in the City of Wichita?

A. Well, we got here about 9, about 9 o'clock because we had car trouble. There were four of us at the time, Burney Smith, Thomas Kelly, a guy named McGee, and myself. We were supposed to come down. Smith, he had some kin down here. Well, my folks stayed here, and I wasn't working down here, and

Mr. Kelly decided to come down with us, so we rode around for a while and started to drinking. Me and Kelly got out on—there is a pool hall between Wabash and Ohio, on Murdock.

Q. Huh-uh.

A. We got out down there about, I guess about 12 o'clock, which they have a house in the back that is open all the time. They play records, and——

Q. Yes.

A. So Smitty and this other guy left, and I don't know, it was about something to three when he come back to pick us up. When he come back he was by his-self, so we got in the car, and we were supposed to be going to Oklahoma when we left Wichita, and when we got out on Kellogg on Bluff, that is when we got stopped.

Q. I see. All right, you have been in court and heard the testimony of the police officers who appeard?

A. Yes.

Q. And were you stopped substantially as they have testified to?

A. Yes.

Q. Then you're stating that between the hours of 2 and 3 o'clock, or after 3 o'clock you were on Murdock Street?

A. No, between 12. We got out down there about 12 o'clock.

Q. All right.

A. Until he come back, picked us up it was something to 3:00.

Q. But you were in the vicinity of Murdock and Wabash?

A. Ohio, the place is between Ohio and Wabash.

Q. Yes, I know where it is.

A. Yes.

Mr. Focht: Your Honor, I object to that reality and move that all be stricken. That is alibi with no notice of alibi having been given, and under the case of *State v. Rider* alibi testimony from a defendant it must be given. The state has to be given at least ten day's notice.

Mr. Hayes: May it please the Court, it's also the law of Kansas that evidence which is subject to be objected to must be objected to at the time that evidence is given, and that a motion to strike testimony that has been given to which there has been no objection comes too late, and——

Mr. Focht: You cannot know it's going to be alibi until you hear it.

Mr. Hayes: Actually, there should be no objection to the jury knowing what the facts are. I can't see what the state would object to.

Mr. Focht: Your Honor, the purpose of the alibi statute is to give the State of Kansas a chance to check it. If a person intends to offer evidence that they were at some other place at some other time, then they must follow the statutes. In the case of *State v. Gene Austin Rider* in the Supreme Court this court held that that included the defendant, and if he is going to offer testimony he was some place else at another time, he must serve notice on the state so that the alibi can be checked, and that has not been done. I ask the testimony all be stricken and the jury asked to disregard it.

Mr. Hayes: May it please the Court, it is also the law in the Supreme Court, *Bradey v. Maryland* [sic], that the purpose of a trial is to find out what happened and that procedural technicalities are to be waived in lieu of constitutional rights, and, therefore, if there is a conflict between procedural rights and the basic constitutional rights, his constitutional rights take precedence, and that procedure technicalities should not be adhered to to the deprivation of a person whose life is in jeopardy.

The Court: Ladies and Gentlemen of the Jury, you are advised that the testimony of Virgil Jenkins is stricken from the record and you are advised to disregard it.

Is there anything further, Mr. Hayes? Do you have any further questions, Mr. Hayes?

Mr. Hayes: I'm just——by virtue of the court's statement I'm just thinking.

The Court: I'm going to excuse the jury.